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IN THE

Supreme Court of the United States

October Term, 1969
No. 366

CARL W. SPAHR and WILLIAM A. KAISER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Central District of California.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Central District of California.

This is a Petition of Carl W. Spahr and William A. Kaiser for Writ of Certiorari to review the judgment and order made by the United States Court of Appeals for the Ninth Circuit on March 28, 1969, affirming the judgment against petitioners made and entered by the United States District Court for the Southern District of California, Central Division (now Central District of California), on August 16, 1966, after that Court found the defendants guilty on all four counts of the indictment on July 25, 1966. Petitioner Carl W. Spahr was found guilty as charged in counts one through four of the indictment and fined the sum of Ten Thousand Dollars ($10,000.00); petitioner William A. Kaiser was found guilty as charged in counts one through four of the indictment and fined the sum

of Six Thousand Five Hundred Dollars ($6,500.00). Suspension of imposition of imprisonment for each of the petitioners was conditioned upon serving a probationary period of five (5) years.

The District Court's opinion was not reported. A copy of the opinion of the United States Court of Appeals for the Ninth Circuit, affirming the lower court, is attached hereto as Appendix "A". The opinion of the Court of Appeals is reported at 409 F. 2d 1303.

Jurisdiction.

The United States District Court for the Southern District of California, Central Division, had jurisdiction of this cause by virtue of Title 18, United States Code, Section 3231, which confers original jurisdiction in the District Courts of the United States for all offenses against laws of the United States (in this case, violation of Title 26, United States Code, Section 7201). Judgment of the District Court was entered against appellants on July 25, 1966; the Court extended the time for a Motion for New Trial, which Motion was denied on August 16, 1966.

A timely appeal was prosecuted in the Circuit Court of Appeals for the Ninth Circuit, which had jurisdiction under Title 28, United States Code, Sections 1291, 1294. The Court of Appeals affirmed the judgment of the court below in an opinion dated March 28, 1969. Petitioners Petition for Rehearing was timely filed with the Court of Appeals pursuant to an extension of time, and was denied by that Court on June 20, 1969. A copy of that Order is attached hereto as Appendix "B".

This Court has jurisdiction under Title 28, United States Code, Section 1254(1) to review the judgment in question.

Questions Presented for Review.

Was the Trial Court in error in failing to suppress all evidence introduced by the government during trial in that such evidence was acquired either directly or indirectly in violation of the constitutional rights of petitioners on the following grounds:

1. The investigating agents failed to notify petitioners of their right to the advice of counsel as guaranteed by the Sixth Amendment to the Constitution after the investigation had reached the accusatory stage, in violation of the rules set forth in *Escobedo v. State of Illinois,* (1964) 378 U.S. 478, and *Miranda v. State of Arizona,* (1966) 384 U.S. 436.

2. The investigating agents failed to notify appellants of their right to refuse access to their business establishment and books and records, and the asserted waiver of the unknown right to demand a search warrant is therefore void, creating an unlawful search under the Fourth Amendment to the Constitution.

3. The intentional concealment of the true purpose of the investigation by the investigating agents—to gather incriminating evidence in a criminal case—constitutes actual or tacit deceit which taints the investigation and creates an unlawful search under the Fourth Amendment to the Constitution.

4. The investigating agents failure to notify appellants of their right to counsel, of their privilege to refrain from furnishing evidence which might tend to incriminate themselves, and of the true nature and pur-

pose of the investigation constitutes a denial of due process under the Fifth Amendment to the Constitution.

Constitutional Provisions at Issue.

FOURTH AMENDMENT—"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FIFTH AMENDMENT—"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

SIXTH AMENDMENT—"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

Statement of the Case.

Appellants were indicted under four counts claiming violation of 26 U.S.C. 7201, pertaining to the calendar years 1959 through 1962 respectively. Each count alleges that the appellants willfully and knowingly attempted to evade and defeat a large part of the tax due and owing by Pioneer Diecasters, Inc. to the United States of America by filing a false corporate income tax return. The defendants were found guilty as charged.

The government's case was based upon three series of transactions involving unreported scrap metal sales, fictitious purchases, and fictitious selling expense. Ap-

pellants contended at trial that all of the evidence produced at trial should have been suppressed in order to protect appellants' rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States. The investigating agents did not apprise appellants of their constitutional rights to retain counsel, to refuse to permit a search of books and records, and to refrain from furnishing evidence which might tend to incriminate themselves. Prior to the agents initial contract with the appellants, the investigation had reached the accusatory stage. The agents also misrepresented the purpose of their investigation, and obtained access to the records of Pioneer through stealth and deceit, intending at all times to gather documentary evidence against appellants for use in a criminal proceeding.

If the trial court had not admitted the evidence which appellants claim is subject to suppression, there clearly would have been insufficient evidence to sustain the judgment of conviction. Appellants' Motion to Suppress raised the issues herein and extensive testimony was taken pertaining to these issues.

The uncontradicted evidence discloses the following facts which demonstrate that the accusatory stage had been reached by April 13, 1964, the date when appellants were first contacted by agents of the Internal Revenue Service. Special Agent Byerly called appellant Spahr on April 13, 1964, and made an appointment to meet with Mr. Spahr at the office of Pioneer on April 14, 1964. Mr. Byerly testified that he is a special agent of the Internal Revenue Service, Intelligence Division, and has been so employed since 1960. He testified that a special agent is a criminal investigator, whose job is to make a recommendation with respect to a criminal fraud case.

Mr. Byerly was accompanied on April 14, 1964 by Revenue Agent Horn. Mr. Horn was assigned to the case at the request of Special Agent Byerly. Mr. Horn was a member of Field Audit Group 107, the group which spends most of its time working jointly with special agents and is often known as the "fraud group".

Appellant's contention is based upon the fact that the bulk of the government's case was developed prior to April 14, 1964. Various agents of the Internal Revenue Service had been working on the case for almost two years prior to this initial contact, and had gathered such substantial documentary and testimonial evidence that their visit to the offices of Pioneer on April 14, 1964 was for the express purpose of obtaining admissions from the appellants and documents for production as evidence in the criminal prosecution which they reasonably anticipated would follow.

Special agents of the Internal Revenue Service began working on the case in June of 1962. The case was initiated by an "information item"—a source of information which is directed immediately to the Intelligence Division. The testimony leads appellants to the reasonable conclusion that the information item had been received from James Wilson, the bookkeeper for Pioneer. Mr. Wilson left the employ of Pioneer on March 1, 1963, and by March 15, 1963, Special Agent Cleo Coons was asking questions of witnesses pertaining to items reflected in the books and records of Pioneer.

William B. Lewis first met with Special Agent Coons on March 15, 1963, and gave a sworn statement before Special Agent Coons on March 20, 1963, in excess of one year before before the initial contact with the ap-

pellants. Mr. Lewis was a "co-conspirator" who seduced appellants into taking the actions for which they were convicted. He knew all and told all. His statement touched on all of the elements of the government's case. Mr. Lewis was a witness in trial.

Mr. Lewis disclosed that fictitious purchases were being created by making use of Keirsey Sales, a fictitious company created by Mr. Lewis. Mr. Lewis disclosed cancelled checks, invoices, and freight bills which pertained to these items. Mr. Lewis had acquired fictitious trucking bills from Dependable Trucking Company, prepared by Harry Massman, the principal in Dependable. Mr. Massman was a witness at the trial. Mr. Lewis also prepared a schedule for Special Agent Coons showing the sale price of all scrap, number of pounds, and amounts of money repaid to defendants. Mr. Lewis also furnished the name of Leo Lugo, a truck driver for Dependable who was a witness at the trial.

Directing his attention to the unreported sales of scrap metal, Mr. Lewis furnished substantial evidence pertaining to the company to whom the scrap was sold, the fact that all sales were for cash, and designated Dependable Trucking Company as the freight carrier and Mr. Lugo as the truck driver. Mr. Lewis also described at this time the transaction involving the fictitious sales expense.

Following the sworn testimony of William Lewis in March, 1963, the case of "Carl Spahr et al.", became a numbered case within the Intelligence Division on April 4, 1963. Mr. Byerly testified that a numbered case is one that has been reviewed so that it has moved

out of the preliminary stage into a full investigation. A special agent will normally receive an unnumbered case, and after a preliminary investigation, if the case merits further investigation, the case become a numbered case.

The case was transferred from Special Agent Coons to Special Agent Byerly on November 14, 1963. At that time Special Agent Byerly familiarized himself with the case file, including the sworn statement of Mr. William Lewis and the material supplied by Mr. Lewis. The government at that time had detailed knowledge of the fraudulent transactions which were subsequently proven at trial. The transactions had been fully described by Mr. Lewis. Mr. Wilson had informed the government of the fact that the fictitious purchases had been claimed as expenses in the corporate books, and that certain items of income had been omitted. The examining agents had merely to verify whether the "fictitious purchases" were reflected in the books and records and the tax return, and whether the "omitted income" from the reported sources was in fact omitted from the tax return. These remaining details were accomplished at the office of Pioneer on April 14, 1964.

The representations to appellants by the investigating agents are not in conformity with their true intent and purpose. The first contact with appellants was on April 13, 1964, at which time Special Agent Byerly called Mr. Spahr and stated, "I advised him that I was investigating the corporate tax returns at Pioneer Diecasters, Incorporated . . . for the years 1959 through 1962." Mr. Byerly identified himself as "Special Agent Byerly with the Intelligence Division, Internal Revenue." He requested several books and records, and told

Mr. Spahr that he would be accompanied by Revenue Agent Roy Horn.

Mr. Byerly testified that upon entering the offices of Pioneer he instructed Revenue Agent Horn to reconcile the books and records to the tax return; he began examining the cash disbursement books, specifically looking for purchases account No. 200. This account reflected the Keirsey transactions. Agent Byerly had also asked Mr. Spahr if it would be all right for him to bring in a microfilmer to help expedite his investigation by microfilming certain records. Mr. Spahr acquiesced. After reviewing the purchases account, Agent Byerly then microfilmed the cash disbursement books of Pioneer, including the Keirsey transaction. He spent the remainder of April 14 and April 16 microfilming other records of Pioneer. *The actual records of Pioneer Die-casters, microfilmed on these two days, were the evidence in trial; not the documentary items received from third persons.*

The use of the microfilmer clearly indicates that Mr. Byerly and Mr. Horn intended to spend April 14, 1964 gathering evidence for use in a subsequent criminal proceeding. Mr. Byerly was interested in microfilming the Keirsey sales transactions. He testified that he was aware that he might be asked to leave at any time, and might have but a short time with the records. The Los Angeles office of the Intelligence Division consists of fifty field agents; these agents share the use of two microfilming machines.

Agent Byerly's notes for April 14, 1964 state, "It was alleged that false purchases from Keirsey Sales Co., P. O. Box 106, Buena Park, California, were being charged to this account. An analysis of this account

verify the allegation that purchases from this company were being charged to account No. 200." The interview record then goes on to state that many items from the books and records were microfilmed. The interrogation included in part the conversation reflected in Agent Byerly's notes: "At 3:30 P.M., Mr. Spahr (Senior) took us through the various production operations pointing out the processes used to make certain dies, and the manufacturing of the product from the die. Mr. Horn asked Mr. Spahr what happens to the scrap metal; would it be remelted? Referring to five barrels of scrap in one corner of the plant, Mr. Spahr (Senior) replied that this waste was no longer the proper purity for their use and would be disposed of. (It was alleged that this scrap metal is sold to Codel Co. for cash and that the proceeds from the sale are pocketed by Spahr (Senior) and Kaiser. No sales of scrap were observed on the books and records to Codel.)"

The record is clear that no warnings were ever given to appellants of their right to retain counsel, to refuse to surrender records without an administrative subpoena or search warrant, and to refuse to make statements which would personally tend to incriminate the appellants. The appellants were never advised by the agents that the visit was other than a routine audit.

ARGUMENT.

I.

Violation of Miranda and Escobedo Rules.

(A) Escobedo Rule.

"A constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra-judicial proceeding. Anything less . . . might deny a defendants' effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah v. United States,* (1964) 377 U.S. 201, 204, 84 S. Ct. 1199, 1202.

This principle led to the ruling in *Escobedo v. State of Illinois,* (1964) 378 U.S. 478, 84 S. Ct. 1758. The Court noted that, "The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pre-trial examination.'" 348 U.S. at 487.

The Court ruled in *Escobedo:*

"We hold, therefore, that where, as here, *the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect,* the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute Constitutional right to remain

silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution. . . . *We hold only that when the process shifts from investigatory to accusatory —when its focus is on the accused and its purpose is to elicit a confession—our advisory system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.*" 378 U.S. at 490-492 (Emphasis added).

To assert these rights, a request is not necessary. *McLeod v. Ohio,* (1965) 378 U.S. 582; *Rice v. Olson,* 324 U.S. 786, 788-789; *Carnley v. Cochran,* (1962) 369 U.S. 506, 513-514.

(B) Miranda Rule.

In *Miranda v. State of Arizona,* (1966) 384 U.S. 436, 86 S. Ct. 1602, 1630, the Court held that a defendant in custody must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Unless and until these warnings are given and a waiver of the rights encompassed by the warnings is clearly demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against the defendant.

The five cases before the Court at the time of the *Miranda* decision all dealt with crimes of violence where the offender had been taken into custody. In justifying its decision in *Miranda,* the Court cited a letter received from the Solicitor General describing the practices of

the F.B.I. in giving warnings to suspects. That letter stated that the F.B.I. then gave the warnings at issue to those persons under arrest for an offense *or whose arrest was contemplated following the interview.* The Court also relied upon the English procedure since 1912, which held that precautionary warnings must be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion (384 U.S. at 485, 487, 86 S. Ct. at 1633, 1634).

The Court has thus far tied the right to the *Miranda* warnings to those instances in which the suspect is in physical custody; no case in which the defendant was not in "custody" has been before the Court. The Court has realized that its definition of custody is somewhat illusory. In *Orozco v. State of Texas,* (1969) 89 S. Ct. 1095, 37 L.W. 4260, the Court held that police officers asking a minimum of questions in a suspect's bedroom were bound by the *Miranda* case. In dissent, Mr. Justice White noted:

> "Here, there was no prolonged interrogation, no unfamiliar surroundings, no opportunity for the police to invoke those procedures which moved the majority in *Miranda.* In fact, the conversation was by all accounts a very brief one. According to the uncontradicted testimony, petitioner was awake when the officers entered his room, and they asked him four questions. . . . It is unquestioned that the sequence of the events in their totality would not constitute coercion in the traditional sense or lead any court to view the admissions as involuntary within the meaning of the rules by which we even now adjudicate claims of coercion relating to pre-Miranda trials." 89 S. Ct. at 1098. 37 L.W. at 4261-4262.

(C) Applicability of Rules to Tax Case.

In refusing to extend the *Miranda* Rule to income tax investigations, some courts have relied upon the lack of "custody" as their rational. Most Appellate Courts also rely on the case of *Kohatsu v. United States*, (9th Cir. 1965) 351 F. 2d 898, relied upon by the Appellate Court in this case. In that case the Court reasoned that in a tax case the investigating agents are attempting to determine whether a crime has been committed rather than whether the particular suspect has committed the crime. Using this interpretation, the ruling of *Escobedo* was made inapplicable to criminal income tax investigations.

In *Mathis v. United States*, (1968) 391 U.S. 1, 88 S. Ct. 1503, the Court ruled that the *Miranda* warnings must be given to an inmate in a state penitentiary when questioned by an Internal Revenue Agent. The Court noted that there was no doubt that the documents and oral statements given by the petitioner to the government agent and used against him were strongly incriminating. These "strongly incriminating" statements by the defendant were that he prepared 1960 and 1961 income tax returns, and that the signatures thereon were his. The government argued that *Mathis* involved a routine tax investigation by an Internal Revenue Agent—a civil investigator—and not by a special agent of the Internal Revenue Service. The Court noted:

> "It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the

> one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during this investigation that his work would end up in a criminal prosecution. We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody." (391 U.S. at 4).

Contrast the limited admissions and the fact that the last visit to jail took place only eight (8) days before the full-fledged criminal investigation began in *Mathis* with the fact in this case. Here a full-fledged criminal investigation had been proceeding for one and one-half years before the meeting in question. The documents turned over to the criminal investigator were indispensable to the government's case.

The feature apparently distinguishing *Mathis* from this case is the illusive definition of "custody". The dissenting opinion of Mr. Justice White noted that the record before the Court did not demonstrate that the civil investigation had raised suspicions of criminal conduct by *Mathis* at the time of the visit, and stated:

> "The State of Florida was confining petitioner at the time he answered Agent Lawless' questions. But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime.

> Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggests reasons why petitioner was 'coerced' into answering Lawless' questions anymore than is the citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews." (391 U.S. at 7).

We believe that *Mathis* was correct in setting aside the holding of the Court in *Kohatsu*—namely, that even though the objective is to establish whether a crime has been committed rather than who committed the crime, the *Miranda* Rule applies to some tax investigations. The concept of "custody" must now be analyzed in a manner which will reasonably assure those who are the object of a criminal income tax investigation that they will be guaranteed the rights set forth in *Miranda*. Income tax crimes are not crimes of violence, and the persons prosecuted for such crimes are rarely arrested and placed in custody. The case is prepared by the investigating agents and funneled through channels of review. The investigatee is afforded opportunities to explain why the indictment should not be returned. It is only after the indictment is in fact returned—several months after the investigation has been fully completed and the case fully prepared—that the token arrest takes place so that bail may be posted. It is improper to apply the concept of "custody" in literal terms in such an investigation.

The courts in California have attempted to face the issue of whether the concept of "custody" should be

interpreted by a subjective or objective standard, or on a case-by-case basis. *In People v. Ceccone,* (1968) 260 Cal. App. 2d 886, 892-893, 67 Cal. Rptr. 499, 503, the California Appellate Court stated that in *Miranda,* this Court implies that an interrogation becomes custodial when the investigation becomes focused upon the person being interrogated. "Once the investigating officer has probable cause to believe that the person being detained for questioning has committed an offense, the officer cannot be expected to permit the suspect to leave. At that point, at the latest, the interrogation becomes custodial and prior to any further questioning the suspect must be warned of his rights. . . ." See also *People v. Wright,* (1969) 273 A.C.A. 356, 78 Cal. Rptr. 75, 80.

The opinion of the Court of Appeals for the Fifth Circuit in *Thomas v. United States,* (1966) 370 F. 2d 96 dealt solely with the propriety of the Grand Jury pool from which the Grand Jury was selected. The issues were expanded in the Petition for Writ of Certiorari, denied March 20, 1967, in which Mr. Justice Douglas dissented as follows (386 U.S. 975, 87 S. Ct. 1164):

> "I would grant this petition on the fourth question. It concerns the apparent practice of Internal Revenue agents in examining taxpayers and using the evidence obtained in criminal prosecution when the taxpayers are given no warnings as to their rights, including the right to have an attorney present. *This is not an in-custody case, but it is a coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one.*" (Emphasis added).

The observation of Mr. Justice Douglas is well founded. Although no Appellate Court has yet expressly applied *Miranda* to an investigatee in a criminal income tax investigation, many District Courts have done so. These Courts have, in some instances, issued opinions contrary to the rulings of the Courts of Appeals in the circuits in which they were sitting. Particularly well reasoned opinions are found in the cases of *United States v. Turzynski,* (N.D. Ill. 1967) 268 F. Supp. 847, *United States v. Wainwright,* (D.C. Colo. 1968) 284 F. Supp. 129, *United States v. Dickerson,* (N.D. Ill. 1968) 291 F. Supp. 633, 636-637. See also *United States v. Carlson,* (E.D.N.Y. 1966) 260 F. Supp. 423, 427; *United States v. Gower,* (M.D. Pa. 1965) 65-2 U.S.T.C. 15,655; *United States v. Kingry,* (N.D. Fla. 1967) 67-1 U.S.T.C. 9262; Hewitt, Sixth Amendment Rights of the Taxpayer in a Fraud Investigation, Bulletin of the Section of Taxation—American Bar Association, Volume XIX, No. 2, January, 1966; Lipton, Constitutional Rights in Criminal Tax Investigations, 53 American Bar Association Journal 517 (June 1967).

Nothing decided or said in *Miranda* links the right to counsel only to protection of Fifth Amendment rights. *United States v. Wade,* (1967) 388 U.S. 218, 226, 87 S. Ct. 1926, 1932. In this case counsel could have advised the appellants of their Fourth and Fifth Amendment rights, and of other rights afforded an investigatee in a tax case as set forth in the Internal Revenue Code. See *e.g., Reisman v. Caplin,* (1964) 375 U.S. 440, 84 S. Ct. 508.

It is clear to appellants that the accusatory stage had been reached in this case. In a matter of moments the investigating agents were able to reconcile the tax

return with the books and records. They then embarked upon a pre-arranged plan to photograph the records of Pioneer and obtain as much incriminating documentary and oral evidence as possible. We believe that this Court will not again see a tax case in which the accusatory stage had so clearly been reached. The case had proceeded beyond the status of a "criminal investigation", as distinguished from a "routine tax investigation", and had reached the stage where the investigating agents sought two pieces of evidence necessary to obtain conviction of the appellants. Appellants therefore believe that even if the Court fails to apply the strict rules set forth in the *Miranda* case, the doctrine of the *Escobedo* case can be applied herein; by holding that the accusatory stage had in fact been reached; the conclusion inescapably follows that the lower court was in error in failing to grant appellant's Motion to Suppress.

We respectfully urge that the *Miranda* Rule should be applied in this case. The taxpayer in an Internal Revenue criminal investigation is in more dire straits than the ordinary criminal who realizes the potential accusatory nature of his contact with the government. The police and F.B.I. are traditionally concerned with criminal activity. Their visual marks of identification disclose them as government agents who are concerned with criminal enforcement. The taxpayer does not know through the mere identification of the Internal Revenue examiner as a special agent that there is a possibility or probability of serious criminal consequences. The special agent's role as a criminal law enforcement agent is seldom known. The taxpayer can neither distinguish between a revenue agent and a special agent nor be-

tween the routine audit and the criminal investigation. It is at this point that the taxpayer finds himself facing his moment of crisis.

The Appellate Court infers a waiver of the right to counsel by Mr. Spahr's inquiry whether his "representative" should be present, and his statement that "He doesn't know much about taxes anyway." The Court implies that "representative" meant "counsel." This finding is in no way supported in the record. These statements demonstrate Mr. Spahr's ignorance of the nature of the investigation and his reliance on the regularity of the inquiry.

The Appellate Court also notes that trial of this case began on June 13, 1966, the date on which *Miranda* was decided. Counsel brought to the Trial Court's attention on June 13, 1966 the fact that *Miranda* had been decided. The final ruling on the Motion to Suppress was not made until July 6, 1966. Counsel suggest that the *Miranda* opinion was announced on the East Coast before trial began on the West Coast on June 13, but that rights of such import should not be resolved on such technicalities.

Mature constitutional law seldom, if ever, thrives on misconceptions and half truths. Hence, it is believed that a taxpayer should be equipped at the very least with knowledge of the fact that he is the subject of a criminal investigation, and preferably with the affirmative knowledge of what his rights are and the consequences

of their waiver. It is believed that this knowledge is basic to a waiver of rights under the Fourth, Fifth and Sixth Amendments.

II.

Failure to Notify Petitioners of Their Right to Refuse Access to Their Business Establishment and Books and Records.

In *Miranda v. State of Arizona, supra,* the Court stated that law enforcement officers have an affirmative duty to advise potential defendants of their right to counsel and right to remain silent. The District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Seventh Circuit have anticipated that this Honorable Court will require investigating officers to advise potential defendants of their constitutional right to refuse access to government officers who seek entry without a search warrant.

In *United States v. Blalock,* (E.D. Penn., 1966) 255 F. Supp. 268, 269, F.B.I. Agents suspected the defendant of robbing a bank. During the robbery the holdup man had taken money, the serial numbers of which had been recorded by the bank. The agents encountered the defendant as he entered his hotel lobby. They had no search warrant. After identifying themselves and asking some preliminary questions, the agents accompanied the defendant to the men's room where he was frisked. The agents then asked the defendant if they could search his room, and he replied that he had no objection. The marked money was found during the

search of his room. In reaching its decision, the Court relied upon the case of *Johnson v. Zerbst,* (1938) 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, which held that the relinquishment or abandonment of a constitutional right must be knowing, intelligent, and voluntary. The Court stated:

> "The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd. . . . To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation. Here, the evidence shows no such warning, nor is there other evidence that Blalock was aware of his Fourth Amendment right. . . . This being so, we need not consider whether the consent was voluntary."

The *Blalock* Rule was adopted by the Court of Appeals for the Seventh Circuit in *United States v. Nikrasch,* (1966) 367 F. 2d 740, 744.

This Court has recently further defined the rights of a defendant against an illegal search and seizure. *Chimel v. California,* decided June 23, 1969; *Spinelli v. United States,* (1969) 89 S. Ct. 584; *Recznik v. City of Lorraine,* (1969) 89 S. Ct. 342.

In *Camara v. Municipal Court of the City and County of San Francisco,* (1967) 387 U.S. 523, 87 S. Ct. 1727, the Court held a local ordinance to be in violation of the Fourth Amendment in that it authorized municipal officials to enter a private dwelling without a search warrant under provisions of the Housing Code:

> "Of course, in applying any reasonable standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. *The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant.* . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part on whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. (Citation) It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive." 387 U.S., at 533, 87 S. Ct., at 1733 (Emphasis added).

In *See v. City of Seattle,* (1967) 387 U.S. 541, 87 S. Ct. 1737, a companion case to *Camara,* the Court stated

that it would not distinguish between inspections of commercial structures and those of private residences:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspectors in the field without official authority evidenced by warrants. As governmental regulation of business enterprises mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. (Footnote, in part citing Note, Constitutional Aspects of Federal Tax Investigations, 57 Col.L.Rev. 676). Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business records, or a perusal of financial books and records. This Court has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations. However, we have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in the subpoena cases for our conclusion that warrants are a necessary and a tolerable limitation on the right to enter upon and in-

> spect commercial premises. . . . In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply. . . . But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." (387 U.S. at 543, 87 S. Ct. at 1739, 1740).

In the above cases the investigating agents bypassed the constitutionally authorized procedure for searching real property or personal property. In this case the investigating agents bypassed the constitutionally authorized procedure for reviewing the appellants' books and records; they relied upon appellants' ignorance of their rights. They allowed the petitioners to rely upon the outward appearance that the "audit" was to determine the tax liability of Pioneer. Appellants were entitled to express notice of the fact that the investigating agents were conducting a criminal investigation so that they could have fully considered the consequences of waiving their right to voluntarily refuse access to the premises and books and records. Petitioners should have been expressly advised of these rights in order to give them meaning. Petitioners do not contend that the agents *must* have advised petitioners of the status of the case and of their rights. The only alternative, however, is for the investigating agents to use those methods of obtaining information normally used in a criminal proceeding—a subpoena, search warrant, or similar judicial order.

The Court of Appeals herein found that although appellants filed a Motion to Suppress on the grounds that their Fourth Amendment rights were violated, the appellants did not specifically argue below that the verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right.

The general issue of the illegal search was presented to the lower court in several instances. In appellants' Motion to Suppress, filed April 4, 1966, the issue was raised of nondisclosure of the status of the case by the agents. In papers filed on April 15, 1966, appellants discussed in detail the rights which they could have asserted in responding to a properly issued administrative summons in the event that the agents had respected appellants' constitutional rights. In papers filed on June 21, 1966, appellants raised the argument that the agents had sufficient evidence in their possession to obtain a warrant for appellants' arrest at the time of the initial visit. The trial court was aware of the broad objection, as is evidenced by its holding.

At no time during the appellate proceeding did the government contend that the issue of the warrantless search had not sufficiently been raised in the court below. This issue had not been maturely discussed by case law prior to the trial herein. The search and seizure issue was raised, however, and extensive testimony was presented to the trial court on this issue. Defendants' Exhibits "A" and "C" contain detailed information on the entire sum and substance of the events taking place on April 14 and April 16, 1964. Agent Byerly testified in great detail to those events, and to the events preceding the claimed illegal search. This is

not a case in which the record fails to consider an issue; the issue was refined on appeal.

Waiver of constitutional rights is never presumed. When the record is silent or unclear on the issue of waiver of a constitutional protection, the government has failed to meet its burden of proof of that waiver. Cases clearly stating this rule *re* the Sixth Amendment right to counsel are *Miranda v. State of Arizona, supra; Johnson v. Zerbst, supra.* A silent record on the issue of waiver means that the government has not met its burden. *Carnley v. Cochran,* (1962) 369 U.S. 506, 516, 82 S. Ct. 884. The same rule applies with regard to consent to search. *Bumper v. State of North Carolina,* (1968) 391 U.S. 543, 548-549, 88 S. Ct. 1788, 1792.

In cases where a search by governmental agents is voluntarily permitted, coercion may be presumed until the contrary is proved. *Johnson v. United States,* (1948) 333 U.S. 10, 13, 68 S. Ct. 367, 368; *United States v. Page,* (9th Cir.) 302 F. 2d 81, 84; *United States v. Smith,* (2nd Cir., 1962) 308 F. 2d 657, 663, cert. den. 372 U.S. 306.

This issue may be raised in a later habeas corpus proceeding. *Kaufman v. United States,* (1969) 89 S. Ct. 1068, 37 L.W. 4238. If the issue may be raised in an entirely new proceeding, why can it not be raised directly on appeal when there is an extensive record on the general issue of search and seizure? Petitioners respectfully assert that the record herein demonstrates no knowing waiver, and that the evidence should have therefore been suppressed.

III.

Concealment of Purpose of Investigation Constituting Deceit.

In *Gouled v. United States,* (1921) 255 U.S. 298, 305-306, 41 S. Ct. 261, this Court held that it was both a Fourth and Fifth Amendment violation for an agent of the United States to obtain entrance to a person's office under the guise of friendship and there obtain incriminating evidence for use against that person:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion. . . . would be an unreasonable and therefore a prohibited search and seizure, . . . it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. *The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.*" (Emphasis added).

The Court of Appeal herein relied upon the case of *United States v. Sclafani,* (2nd Cir., 1959) 265 F. 2d 408 in deciding the issue of whether there was actual or tacit deception. In *Sclafani,* the case was originally assigned to a revenue agent. His duty was to go out and audit the returns assigned for investigation; he

truthfully told the taxpayer that he was there on a "routine" audit. As a result of subsequent discovery of discrepancies between the corporate books and certain corporate checks; the agent had subsequent discussions with the taxpayer, and only after these discussions referred the case to a special agent. In analyzing the problem, the Court stated:

> "Moreover it is unrealistic to suggest that the government could or should keep the taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose." 265 F. 2d at 415.

The case of *Kohatsu v. United States, supra,* also involved a routine audit which was subsequently referred to the Intelligence Division.

Contrast the facts in *Sclafani* and *Kohatsu* with those in this case. The initial contact was not by a revenue agent but by a special agent accompanied by a revenue agent from the fraud squad; the case was not assigned as routine audit, but was originally an information item which had been worked by criminal investigators for one and one-half years prior to contact with the taxpayer; the investigation was not a general inquiry into the tax liability of the corporation, but was for the limited purpose of gathering evidence against appellants which confirmed the agents established position. This limited function was performed in a matter of minutes. There was no change in the nature of the investigation to be detected by the investigatee. There was no "audit" as that term is normally construed; the investigating agents were there to photocopy documents pursuant to a prearranged schedule. The nomenclature

of "routine tax investigation" simply does not apply to this case; it must be viewed in light of its very unusual facts.

In *United States v. James,* (6th Cir. 1967) 378 F. 2d 88, 90, the Court held that a search pursuant to a proper arrest was invalid. Ten (10) police officers arrested the defendant in her apartment pursuant to a warrant for her arrest. The testimony disclosed that there was a pre-conceived plan to search the house prior to entry of the premises. In holding the search illegal, the Court stated:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment, with the hope of finding narcotics. The search, in our judgment, was unreasonable and violated the rights of appellant James under the Fourth Amendment to the Constitution."

Counsel suggest that no case can be cited holding that government agents may present their credentials as representatives of the Internal Revenue Service, indicating that they wish to audit income tax returns, when their true purpose is to gather evidence subsequently used in a criminal trial. The falsely conveyed appearance of regularity certainly constitutes a form of deception and deceipt. Appellants had no means of determining this purpose until they had furnished the bulk of the evidence used at trial. To hold that such a subterfuge is not equivalent to an illegal search by force or by coer-

cion would be to ignore the reasoning expressed in *Gouled v. United States, supra,* and the spirit of the Fourth Amendment.

The reasoning of the *Sclafani* case has been erroneously applied by lower courts since it was authored. Appellants urge the Court to examine this issue in order to set standards of candor to be applied by tax agents in the field, in conformity with the Court's opinions dealing with suspects of crimes of violence.

IV.

Denial of Due Process Under the Fifth Amendment to the Constitution.

The cases of *Gideon v. Wainwright,* (1963) 372 U.S. 335 and *Pointer v. State of Texas,* (1965) 380 U.S. 400 stand for the legal proposition that the right to counsel, and the benefits which necessarily flow from that right, is "a fundamental right, essential to a fair trial," and "thus was made obligatory on the states by the Fourteenth Amendment." *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S. Ct. 1489, 1492.

The same rationale applies to the violations of the Fourth Amendment previously discussed herein. In *Mapp v. Ohio,* (1961) 367 U.S. 643, 81 S. Ct. 1684, the Court held that the Fourth Amendment's protection against illegal searches and seizures is enforcible against the States through the due process clause of the Fourteenth Amendment. Appellants urge that the actions of the government agents as described above, when considered in their totality, constitute action having the effect of denying appellants their Constitutional rights under the due process clause of the Fifth Amendment.

V.
Conclusion.

The function of the Internal Revenue Service is to assess and collect taxes. When Internal Revenue agents are carrying out this function they should be distinguished from other law enforcement agents. However, when Internal Revenue agents are not attempting to determine the correct tax liability of a taxpayer, but rather are attempting to gather evidence for use in a criminal prosecution, they may not be distinguished from any other law enforcement agent.

Since the function of an Internal Revenue Agent is to determine the correct liability of taxpayers, the use of these agents to gather evidence for prosecution will likely mislead a taxpayer and substantially impair his ability to assert his Constitutional rights. The Court should therefore take care to distinguish "tax compliance" from criminal law enforcement.

As of the date of the first visit with appellants herein the government agents had received information, or knew the details concerning the activity of four of the six witnesses whom the government presented at trial; indeed, the four most significant witnesses. A summary of the relevant dates adduced at trial is most enlightening:

June 15, 1962—Information item on case, assigned to special agent.

November 14, 1962—Case transferred to Special Agent Coons.

March 1, 1963—Mr. James Wilson, the bookkeeper at Pioneer, left the employ of said business.

March 15, 1963—Special Agent Coons met with William Lewis for the first time.

March 20, 1963—William Lewis appeared to give a sworn statement before Special Agent Coons.

April 4, 1963—The case of Carl Spahr, *et al.*, became a numbered case within the Intelligence Division.

November 14, 1963—The case was first assigned to Special Agent William Byerly.

April 13, 1964—Carl Spahr was first contacted by a representative of the United States.

The transactions at issue had been described by Mr. Lewis, and Mr. Wilson had advised the agents of the contents of the books and records. A simple reconciliation of the books to the tax returns remained. The agents were not fact-finders; they were evidence gatherers. To hold that defendants in this critical stage in a tax case are not clothed with the same rights as are defendants in crimes of violence is an unjustified application of Constitutional principles. Trial Courts have realized this and have held contrary to Appellate Courts. A ruling by this Court is necessary to establish certainty where there is now chaos.

Respectfully submitted,

BRUCE I. HOCHMAN and
HARVEY D. TACK,
By HARVEY D. TACK,
Attorneys for Petitioners.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Carl W. Spahr and William A. Kaiser, Appellants, vs. United States of America, Appellee. No. 21,324.

[March 28, 1969]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and BROWNING, Circuit Judges, and POWELL, District Judge.

POWELL, District Judge:

Appellants challenge their conviction on four counts of attempting to evade corporate income taxes for the years 1959-1962, inclusive. Appellants were officers of a California corporation known as Pioneer Diecasters, Inc. They were responsible for the preparation of the corporate income tax returns. There is no challenge to the sufficiency of the evidence. It shows four distinct schemes to evade taxes. Error is claimed in the denial by the trial court of appellants' motion to suppress evidence obtained in violation of their Fourth, Fifth and Sixth Amendment rights.

The facts pertinent here are as follows:

Internal Revenue investigation of Pioneer Diecasters was commenced because of an "information item," an informer's tip. A year and a half of intermittent investigation by special agents of the Intelligence Division preceded the events which were the basis of the motion to suppress.

In April 1964 a special agent named Byerly had charge of the investigation of the Pioneer Diecasters. By that time it was a "numbered case," one which had proceeded from preliminaries to full-scale examination. Through his group Chief Agent Byerly could initiate a recommendation for criminal prosecution.

On April 14, 1964 Special Agent Byerly and Revenue Agent Horn of the "fraud group" of the Audit Division met by appointment with appellant Spahr at the Pioneer Diecasters' offices. The agents had cause to believe that fictitious transactions had been entered in the corporate records. They had not seen them. Without reconciling them with the corporate tax returns they could not determine whether taxable income had been understated. On April 14 and 16, 1964 Agents Byerly and Horn were permitted to examine and copy the corporate records. The evidence thus obtained, which constituted a substantial part of the Government's case against defendants, was the subject of appellants' motion to suppress.

Byerly and Horn introduced themselves as Internal Revenue Agents. No warnings were given before the agents copied the company records. The appellants complain that this violated their Fourth, Fifth and Sixth Amendment rights. The corporate records were received in evidence. There was no testimony tending to show that any oral statements or admissions were made by either of the appellants tending to incriminate them.

I. *Right to Counsel*

Appellants complain that Agents Byerly and Horn did not inform Spahr of his right to counsel before commencing their examination of the corporate records.

They argue that this failure to warn constitutes denial of counsel and that it taints the proceedings to the extent that the examination was an unreasonable search and that the appellants were compelled to incriminate themselves.

Spahr asked Agent Horn whether his "representative" should be present. Agent Horn replied that "it was up to [Spahr]," and Spahr responded, "Well, he doesn't know much about taxes anyway." "Representative" in this context appears to refer to Spahr's lawyer who appeared later in the investigation.

In *Escobedo v. State of Illinois,* 378 U.S. 478, 490 (1964), relied on by appellants, the court discusses the stages of criminal investigation and the "focus on a particular accused." The court later set forth a specific procedure to be followed when "custodial interrogation" was contemplated. *Miranda v. Arizona,* 384 U.S. 436 (1966). The "custodial interrogation" limitation provides a point of reference for law enforcement, a means of determining when a suspect should be warned of his right to counsel.[1]

In *Kohatsu v. United States,* 351 F.2d 898, 901 (9th Cir. 1965), *cert. den.,* 384 U.S. 1011 (1966), a tax case, this Court said:

> "In taking the phrase 'focus on a particular suspect' out of context, appellant would extend the rule of Escobedo beyond any logical implication of

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[1] *Johnson v. New Jersey,* 389 U.S. 719, 734 (June 20, 1966) refuses to make *Miranda* retroactive. The *Miranda* guidelines are available "only to persons whose trials had not begun as of June 13, 1966." The trial of the instant case started Monday, June 13, 1966. If Rule 45(a) F.R.Cr.P. is applied and the first day is excluded there may be doubt if the *Miranda* rules should be applied to this case.

> the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested."

The holding in *Kohatsu* was reaffirmed in *Selinger v. Bigler*, 377 F.2d 542 (9th Cir.), *cert. den.*, 389 U.S. 904, *reh'r den.*, 389 U.S. 998 (1967). The *Kohatsu* decision and the custodial interrogation rule have been relied upon by other circuits to reach the same result. *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *United States v. Maius*, 378 F.2d 716 (6th Cir.); *cert. den.*, 389 U.S. 905 (1967); *United States Mancuso*, 378 F.2d 612 (4th Cir.), modified, 387 F.2d 376 (1967).

The Supreme Court decided *Mathis v. United States*, 391 U.S. 1, on May 6, 1968. In the *Mathis* case the court reversed the 5th Circuit decision found in 376 F.2d 595 and held that the rule enunciated in *Miranda v. Arizona, supra*, applies to tax fraud investigations by revenue agents. At the time Mathis was interrogated he was incarcerated in the Florida State Penitentiary on an unrelated charge. The court explicitly limited its holding to "custodial interrogation" situations and quoted from *Miranda* as follows:

> "'To summarize, we hold that when an individual is taken into custody, or otherwise deprived of his freedom by the authorities in any significant way

and is subjected to questioning, the privilege against self-incrimination is in jeopardy. 384 U.S. at 478.'" (391 U.S. 1; at p. 5).

This Court has recently expressed its reluctance to extend the *Miranda* rule beyond its stated limits. *F. J. Buckner Co., dba United Engineering v. N.L.R.B.*, 401 F.2d 910, 914 (9th Cir. 10/1/68), *cert. den.*, 37 U.S. L.W. 3305 (U.S. Feb. 24, 1969), ... U.S. ..... Spahr was not in custody or deprived of his freedom in any way when he consented to the examination and copying of the corporate records. The agents were not required to advise him of the right to counsel. No deprivation of Fourth, Fifth or Sixth Amendment rights should be predicated upon failure to give a warning that was not required.

II. *Warnings of Fourth Amendment Rights*

The Supreme Court in *Mancusi v. De Forte*, 392 U.S. 364 (1968), held that a union official sharing a large office with others had standing to object to an illegal search and seizure of corporate records. Unlike Mancusi, the appellants here contend that a warning should have been given advising them that the corporation was privileged to deny access to its records unless under authority of a search warrant. Because it was not, they contend the evidence challenged by their motion to suppress was the result of an unlawful search. See: *Wong Sun v. United States*, 371 U.S. 471 (1963); *Boyd v. United States*, 116 U.S. 616 (1886). We recognize that a corporation is afforded the Fourth Amendment's protection against unreasonable searches and seizures. *Mancusi v. De Forte*, 392 U.S. 364, 367 (1968); *Silverthorne Lumber Co. v. United States*, 251

U.S. 385 (1920); *Hale v. Hinkel,* 201 U.S. 43 (1906).

The issue which the appellants now seek to raise was not presented to the trial court. Although the motion to suppress relied upon the Fourth Amendment, it did so solely on the grounds that the Fourth Amendment was violated because the search was conducted without warning the appellants of Fifth and Sixth Amendment rights, and under misrepresentation as to the purposes of the search (a contention considered below).

Appellants did not contend before the district court that they had a Fourth Amendment right to insist upon a search warrant, and that their verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right. Neither this Fourth Amendment claim nor the issue of waiver was litigated in the district court; both appear for the first time in appellants' opening brief on appeal.

In these circumstances we need not, and do not, reach these issues, particularly since the failure to raise them below resulted in an inadequate evidentiary record on the waver issue. *Standley v. United States,* 318 F. 2d 700, 701 (9th Cir. 1963).

III. *Purpose of Investigation*

Appellants contend that Agents Byerly and Horn concealed the true purpose of their investigation, which was to collect evidence for a criminal prosecution. If the agents procured their invitation through guile or fraud, the subsequent examination of Pioneer's records would constitute an unreasonable search. *Gouled v. United States,* 255 U.S. 298 (1921); See also, *Hoffa v. United States,* 385 U.S. 293 (1966); *Lewis v. United States,* 385 U.S. 206 (1966). We find no deception.

Agent Byerly identified himself as a special agent from the Intelligence Division of the Internal Revenue Service. Agent Horn identified himself as a revenue agent from the Audit Division. *Kohatsu v. United States, supra; United States v. Sclafini,* 265 F.2d 408 (2d Cir.), *cert. den.,* 360 U.S. 918 (1959). In the *Sclafini* case the Court said:

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission." 265 F.2d at 414, 415.

IV. *Self-Incrimination*

Appellants next complain of the agents' failure to advise Spahr of his privilege against self-incrimination. But appellants made no statements and none were testified, to, unless the testimony concerning their consent to the examination of the records could be so classified. The corporation has no privilege against self-incrimination. *United States v. White,* 322 U.S. 694 (1944); Note, *The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination,* 112 U.Pa. L. Rev. 394 (1964). Appellants could be required to produce the corporate records, although the records might incriminate them personally. *Wild v. Brewer,* 329 F.2d 924 (9th Cir.), *cert. den.,* 379 U.S. 914 (1964).

V. *Due Process*

Appellants next contend that the cumulative effect of these several failures to warn denied them due process. The failure of the agents to give the Miranda-type warnings has been considered separately. We have refused to consider the Fourth Amendment claim that the appellants should have been advised of their rights against unreasonable searches and seizures because it was not raised at trial. The total effect is not a deprivation of due process.

Affirmed.

APPENDIX "B".

Order.

United States Court of Appeals, for the Ninth Circuit.

Carl W. Spahr and William A. Kaiser, Appellants, v. United States of America, Appellee. No. 21,324.

Before: KOELSCH and BROWNING, Circuit Judges, and POWELL, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*Honorable Charles L. Powell, United States District Court for the Eastern District of Washington, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 366

CARL W. SPAHR AND WILLIAM A. KAISER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is reported at 409 F. 2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1969. (Pet App. 1.) A petition for rehearing was denied on June 20, 1969. (R. Vol I, unnumbered page.) [1] The petition for a writ of certiorari was filed on July 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." references are to the two volume record certified to the Court.

QUESTIONS PRESENTED

Whether petitioners' consent to inspection and copying of records of their corporation was rendered invalid and legally ineffective because the investigating special agent of the Internal Revenue Service did not advise them that his investigation might lead to a criminal prosecution and did not inform them of their rights under the Fourth, Fifth, and Sixth Amendments.

STATEMENT

Petitioners were convicted on all four counts of an indictment which charged them with attempting to defeat and evade the income taxes of Pioneer Die-casters, Inc., by filing false corporation income tax returns on behalf of that corporation of which they were president and vice-president. (R. Vol. I, pp. 1–6, 106–107.)

On April 14, 1964, petitioner Spahr met, by prior appointment, in the corporation offices with Special Agent Byerly and Revenue Agent Horn, who identified themselves as such agents. (Pet. App. 2; R. Vol. II, 191–193.) Spahr asked Agent Horn if he should have his representative present. Horn told Spahr this was up to him, and Spahr replied "Well, he doesn't know much about taxes anyway." (Pet. App. 3; R. Vol. II, 194.) The agents asked and were granted permission to inspect and copy corporation records. (Pet. App. 2; R. Vol. II, 184, 194.) As of that date, the agents had cause to believe that fictitious transactions had been entered on these records, but they did not know whether such entries were carried over to the corporation's tax returns, or that

the returns omitted any income from sales—and they could not ascertain this without comparing the corporation records with the tax returns. (Pet. App. 2; R. Vol. II, 204.) Evidence thus obtained was introduced against petitioners by the government, after their motion to suppress was denied. (Pet. App. 2.)

The agents did not advise petitioners of the corporation's rights under the Fourth Amendment, or of their personal privilege against self-incrimination under the Fifth Amendment or their right to counsel under the Sixth Amendment. (Pet. App. 2.) There was no testimony that either petitioner made any incriminating statement or discussed any substantive matter with the investigating agents. (Pet. App. 2.)

ARGUMENT

1. Petitioners' consent to inspection and copying of corporation records was not invalid because they were not advised of their rights under the Fourth, Fifth, and Sixth Amendments. Petitioners were not in custody or deprived of freedom in any way and were therefore not subject to the type of coercive atmosphere against which this Court established safeguards in *Escobedo* v. *Illinois,* 378 U.S. 478, and *Miranda* v. *Arizona,* 384 U.S. 436. In numerous cases, this Court has declined to review holdings of various circuits that the *Miranda* warnings are not required in tax investigations under such circumstances. See, *e.g., Taglianetti* v. *United States,* 398 F. 2d 558, 566 (C.A. 1), affirmed, 394 U.S. 316; *United States* v. *Mackiewicz,* 401 F. 2d 219, 223 (C.A. 2), certiorari denied, 393 U.S. 923; *United States* v. *Mancuso,* 378 F.

2d 612, 619, modified, 387 F. 2d 376 (C.A. 4), certiorari denied, 390 U.S. 955; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975; *United States* v. *Maius,* 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States,* 405 F. 2d 34, 40 (C.A. 8), certiorari denied, 394 U.S. 943; *Selinger* v. *Bigler,* 377 F. 2d 542 (C.A. 9), certiorari denied, 389 U.S. 904. See also *Agoranos* v. *United States,* 409 F. 2d 833, 835 (C.A. 5), pending on petition for a writ of certiorari, No. 163, October Term, 1969; *Hensley* v. *United States,* 406 F. 2d 481, 484–485 (C.A. 10). Contra: *United States* v. *Dickerson* (C.A. 7), decided July 28, 1969 (69–2 U.S.T.C. Par. 9556).[2]

The court of appeals declined (Pet. App. 5–6) to review petitioners' contention (Pet. 21–27) that the rationale of the *Miranda* case also requires "investigating officers to advise potential defendants of their constitutional right to refuse access to government officers who seek entry without a warrant." The court of appeals correctly noted (Pet. App. 6) that this

[2] In *Dickerson*, the court of appeals held that the full *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." However, the opinion also stated "we have determined to apply our holding to interrogations taking place after the date of this decision." See also, *United States* v. *Habig* (C.A. 7), decided July 28, 1969 (69–2 U.S.T.C. Par. 9557) (remanded to ascertain whether suppressed evidence was discovered before or after referral to Intelligence Division); Cf. *United States* v. *Lackey* (C.A. 7), decided July 16, 1969 (69–2 U.S.T.C. Par. 9532) (suppression order affirmed in view of "custodial nature" of interview by Special Agent with taxpayer). Petitions for rehearing have been filed in each of these three cases.

contention was not litigated in the district court.[3] The two cases cited by petitioners to support this contention are clearly distinguishable, since they involve restraints on freedom which vitiated the defendant's consent to a search. *United States* v. *Nikrasch,* 367 F. 2d 740, 744 (C.A. 7) (search of his auto held illegal where defendant's consent was given after he had been in custody for eight hours); *United States* v. *Blalock,* 255 F. Supp. 268, 269 (E.D. Pa.) (search of hotel room held illegal where defendant had been "frisked" in hotel lobby and escorted to his room by FBI agents). Moreover, in *Byrd* v. *Lane,* 398 F. 2d 750, 755 (C.A. 7), certiorari denied, 393 U.S. 1020, the court of appeals stated that its language in *Nikrasch* regarding the necessity of specific advice on Fourth Amendment rights was "of dubious propriety" though not inappropriate to the facts of the *Nikrasch* case. In *Gorman* v. *United States,* 380 F. 2d 158, 164, the First Circuit rejected the *Blalock* case and the language in *Nikrasch* as an inappropriate transfer of the *Miranda* rule to a setting where the problem and policies involved are quite different, *i.e.,* where the dangers of unreliable evidence are not involved and the law does not absolutely forbid forcible seizure of evidentiary articles. This seems particularly true here, where the petitioners could have been com-

[3] The petitioners' written motion to suppress (R. Vol. I, 13–14) refers only to the petitioners' right to an admonition of their right to counsel and their privilege not to incriminate themselves. Petitioners' memorandum in support of this motion (R. Vol. I, 15–48) and their oral argument to the district court (R. Vol. II, 7, 20–21) assert only the corporation's right to assistance of counsel under the Sixth Amendment.

pelled to produce the corporate records despite their incriminating nature. *Hensley* v. *United States,* 406 F. 2d 481, 484–485 (C.A. 10).

2. There is no merit to petitioners' contention (Pet. 28–31) that the agents practiced deceit because they did not advise Spahr that the investigation could result in a recommendation of criminal prosecution. The court of appeals found (Pet. App. 6–7) that the agents properly identified themselves, and that no deception was practiced (Pet. App. 6). See also *Kohatsu* v. *United States,* 351 F. 2d 898, 902 (C.A. 9), certiorari denied, 384 U.S. 1011. As pointed out in *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918, an announcement by Treasury agents that they are making even a "routine" tax investigation carries an "inherent warning" that they "will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission." Accord: *Scanlon* v. *United States,* 223 F. 2d 382, 384–385 (C.A. 1); *United States* v. *Frank,* 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States,* 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Achilli,* 234 F. 2d 797, 805–806 (C.A. 7), affirmed, 353 U.S. 373; *Zacher* v. *United States,* 227 F. 2d 219, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993; *Montgomery* v. *United States,* 203 F. 2d 887, 892–893 (C.A. 5). Moreover, even if the agents' actions could be considered deceptive, the deception would not be such as to vitiate petitioners' voluntary surrender of the corporate records. *Frazier* v. *Cupp,* 394 U.S. 731, 737, 739.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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October Term, 1969
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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS.

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SUPPLEMENTAL BRIEF OF PETITIONERS.

Petitioners herein file a Supplemental Brief pursuant to Rule 24(5) of the Supreme Court Rules, in order to call attention to new cases not available at the time of the filing of the Petition.

At page 18 of the Petition, Petitioners stated that no Court of Appeals had yet expressly applied the case of *Miranda v. State of Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, to an investigatee in a criminal income tax investigation. Petitioners did point out that many District Courts have done so, in some instances contrary to the rulings of the Court of Appeals in the Circuits in which they were sitting.

The United States Court of Appeals for the Seventh Circuit issued opinions in three cases on July 16 and July 28, 1969, which decisions conflict with the deci-

sions of other Courts of Appeal on the same matter. See Brief for the United States in Opposition, pages 3 and 4.

In *United States v. Lackey,* decided July 16, 1969, 24 AFTR 2d 69-5177, the Court of Appeals for the Seventh Circuit affirmed an Order of the District Court suppressing the transcript of an oral interview, the inventories of two safe deposit boxes, and the bank statements and cancelled checks from a bank account obtained on the same date. The District Court had held that an interview in the basement of the Monticello Post Office Building of three hours' duration was custodial in nature.

The above rule was expanded substantially in *United States v. Dickerson,* decided by the Court of Appeals for the Seventh Circuit on July 28, 1969, 24 AFTR 2d 69-5316. The lower Court had entered an Order suppressing evidence obtained from the Defendant during the criminal tax investigation and before his retention of counsel. The Appellant Court affirmed. The opinion dwells at length on the policy underlying the *Miranda* decision, and the cases that have since failed to apply the *Miranda* doctrine to a criminal tax investigation. The Court notes that many distinctions cannot survive this Court's decision in *Mathis v. United States,* 391 U.S. 1, 88 S. Ct. 1503. We quote liberally below from the Appellate Court decision:

> "We recognize the factual limitations of the precise holding in *Miranda.* On the other hand, we cannot accept an interpretation of that decision

which would restrict the implementation of the Court's overriding concern with the opportunity for intelligent exercise of Constitutional rights to interrogations conducted in police stations. . . . The Government's brief appears to recognize that ignorant compliance with the requests of the authorities can no longer be equated with a valid waiver of constitutional rights. We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. . . . The Government argues that the absence of custodial detention and other indicia of criminal prosecution in the tax fraud investigation negatives any possibility of coercion or overbearing of the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless be-

lieve that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe. . . . Only the rare taxpayer would be likely to know he could refuse to produce his records to IRS agents. Nor would he be likely to make any distinction between revenue agents and special agents without some examination as to the different functions of these two offices. . . . Incriminating statements elicited in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protection as a custodial confession extracted without proper warnings. . . . Under such circumstances, it is imperative that the taxpayer be advised that he is the subject of a criminal investigation and that he need not answer questions put to him by the agents. . . . Our conclusion is that *Miranda* warnings *must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division.* We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind. Absent such warnings, the motion to suppress in the present case was properly granted. . . ." (Emphasis added).

In *United States v. Habig,* also decided by the Court of Appeals for the Seventh Circuit on July 28, 1969, 24 AFTR 2d 69-5313, the District Court granted the defendant's motion to suppress the records of *five corporations* that were photocopied by agents of the Internal Revenue Service during the investigation of possible criminal violations of the Internal Revenue Code. It was clear that the records which were photocopied were obtained without a search warrant, summons or subpoena. The essential point of dispute, and the issue on which the District Court's finding of fact turned, was whether the consent was vitiated when the purpose of the investigation shifted from civil to criminal.

The record in *Habig* was unclear in that the trial court did not adequately ascertain whether the records introduced in evidence were received by the Government prior to or subsequent to referral of the case to the Intelligence Division. The Order to suppress was therefore vacated and the case was remanded to the trial court for further hearing to develop facts necessary to the application of the standards announced in *Dickerson, supra.*

The rule of law set forth in *United States v. Dickerson, supra,* is directly in point in the case at Bar, and the general rule has been extended by the holding in *United States v. Habig, supra,* to a corporate officer who unknowingly furnishes corporate records without the compulsion of a search warrant, summons, or subpoena. Petitioners argue in the Petition that the issues

in this case should be decided by this Honorable Court in order to accurately apprize Government agents, taxpayers, and the Bar of the rights of an investigatee in a criminal income tax investigation. Conflict between the Courts of Appeal adds further weight to this argument.

Petitioners respectfully request that the Petition be granted so that the Court may consider these important questions of law.

Respectfully submitted,

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